IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

Court of Appeals
Case No. 1 CA-CR 11-0895

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

STATUS CONFERENCE

HEARING RE PENDING MOTIONS

AUGUST 10, 2010

Camp Verde, Arizona

ORIGINAL

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

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APPEARANCES OF COUNSEL:

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Proceedings had before the Honorable WARREN R. DARROW, Judge, taken on Tuesday, August 10, 2010, at Yavapai County Superior Court, Division Pro Tem B, 2840 North Commonwealth Drive, Camp Verde, Arizona, before Mina G. Hunt, Certified Reporter within and for the State of Arizona.

P R O C E E D I N G S

THE COURT: This is cause No. V1300CR201080049, State of Arizona versus James Arthur Ray.

His presence is waived for today, Mr. Li or Ms. Do?

MR. LI: Yes, Your Honor.

THE COURT: Representing Mr. Ray are Mr. Li and Ms. Do. The state is being represented by Ms. Polk. This is the time for hearing on some motions.

I thought two I wanted to address with oral argument would be the request by the defendant to change place of trial, and then there is some requests for records relating to the medical examiners. I wanted to address those today. And there is one other motion in limine that could probably be addressed as well having to do with financial records. If you're prepared to address those.

I have times now. I see that you looked at those times for hearing the more extensive motions, which, I think, will be the 404(b), 403 motions. But I would like to address first the motion for the change of venue or change of place

of trial if we can do that.

MR. LI: Yes, Your Honor. I would like to start off by acknowledging that we neglected to file a written request to waive Mr. Ray's appearance. I think we mistakenly thought that the prior request for the July hearing date covered this. We do apologize for that, Your Honor.

THE COURT: Okay. I do want to have the request. That was the understanding when we started out.

MR. LI: Understood. I checked with Ms. Do, and I think that's requested. We did fail, and we apologize.

THE COURT: All right.

MR. LI: With respect to sort of what's on the docket, Your Honor, I think with respect to the financial evidence motion, we just filed the replies or we're going to file the replies today. So I think it's premature to hear that particular motion. That's the last motion in limine relating to financial records.

THE COURT: Okay.

MR. LI: And then with respect to the motion to change venue, we simply submit on our papers. We think that -- you know -- this matter might be

more properly taken up closer to trial depending on what the publicity is at the time of trial. We'll submit it on our papers.

THE COURT: Ms. Polk. Before -- before you say what you'd like to, I'd like to hear from both parties on jury selection and some ideas with regard to jury selection because I think that might really head off possible problems that relate to change of venue.

I was thinking in terms of a questionnaire or meeting sometime ahead of the hearing, considerably ahead of the trial, and having -- you know -- perhaps a video or some explanation of the case and some detail. And then at that point, essentially, putting an admonition in effect to the degree it could be stated.

Anyway, Ms. Polk, with regard to the change of place of trial, do you agree that that would be better left closer to the trial?

MS. POLK: Your Honor, I believe it is an issue that the defendant can continue to raise, because at any time should the atmosphere here rise to that level that's set forth in the U.S. Supreme Court cases, then clearly a change of venue would be warranted.

But I would like the Court to make a determination today. I believe in the defense motion they have requested a ruling on a change of venue based on a presumption of prejudice. So the standard that's set out in the cases to determine change of venue is really a two-part analysis. Is there a presumption of prejudice without actually getting to the stage where we're interviewing the jurors? And if there is not, then when we get to the trial on appeal when a court is looking back at a case, was the pretrial publicity so pervasive that the defendant in actuality did not get a fair trial?

So the defense motion was based on this presumption of prejudice. In other words, because of the pretrial publicity that this case has experienced already, the atmosphere is so pervasive that in this county they cannot get a fair trial.

I think it's clear that that is absolutely not the case. It's clear that the pretrial publicity does not rise to the level described in the cases that are set forth in both of the motions. And I also believe that the Court has appropriately controlled the balance between publicity and the right to free press with the

rights of the defendant in this case.

And I won't take a lot of time, Judge, but I just want to cover a little bit the standard for the burden that the defendant has to meet in order for a court to find that presumption of prejudice. Because they have not come even close to meeting that standard.

The seminal case is really the Sheppard case. And if the Court takes the time to look at the Sheppard case, it's very clear that what has happened in this case is completely different, completely different. And I don't think anybody can read the facts of the Sheppard case and not agree that there was no way in that carnival-like atmosphere that that defendant was not going to get a fair trial.

But the stream of cases from the United States Supreme Court all come from the '60s. And it's apparent in reading the Sheppard case and the Irvin case and some of the other cases that back in the late '50s and the '60s when the cases were being held at the trial court level that the judges weren't really sure how to control the issue of the press.

But in the Sheppard case it's clear that

the press, essentially, took over the courtroom. And, in fact, one of the salient factors that's present in the Sheppard case is that the Court actually created a bench, a table, inside the bar where they let 20 reporters sit. And some of the reporters were as close as three feet from the jury.

The daily publicity in that case was such that after the fact, when jurors were interviewed, the bulk of them had already made up their mind about the guilt of the defendant before the trial had even begun.

I think it's important and it's illustrative to contrast the Sheppard case with the cases that then came down in Arizona in the '70s and '80s and then come up to the current case, the most important recent case for the United States Supreme Court, which is the Skilling case, which arises from the Enron prosecutions. And that decision was just issued by the United States Supreme Court on June 24 of this year.

And the Skilling case dealt with the issue of pretrial publicity and whether or not that presumption of prejudice arose from the pretrial publicity. U.S. Supreme Court said no. And they

looked at the factors present, compared them with that history of cases that I've talked about and then looked at specifically the conduct of the Court in striking that balance between the press's right to access to the courtroom and to the information and then what the Court did in terms of voir dire of the jury, the jury questionnaires, and then appropriately keeping the press away from witnesses, from the parties, essentially, a gag order being placed on all parties, which the Court has done in this case.

So I think in comparing the cases, it's real clear through the history that the seminal cases out of the United States Supreme Court dealt -- clearly dealt with scenarios that were carnival-like atmospheres to describe their words.

I also think it's interesting looking at the history in Arizona the cases from the '70s and '80s, the Arizona cases of Atwood and Gretzler. There was a time when the courts in trying to protect the defendant's right to a fair trial actually tried to hide from the press where the case was going to be held. So in both the Atwood and Gretzler cases the courts changed venue but then kept it secret or tried to keep it secret and

didn't tell the press that the case was going to be held in another county. And obviously that's not the solution either.

I do think that the Skilling case is the case that sets forth the solution, which is how do we appropriately control the parties? How do we appropriately keep the -- make sure that the jury we empanel does not have preconceived notions about guilt or innocence.

I just want to end by reading the quote from the Skilling case. It's on the last page. And that's where the Court says, the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Neither prosecutors, counsel for defense, the accused, witnesses, court staff, nor enforcement officers coming under the jurisdiction of the Court should be permitted to frustrate this function.

And, Judge, it's clear in this case this court is already taking those appropriate remedial measures. You issued a gag order within the first

couple of weeks of the indictment. And I believe the parties have all scrupulously abided by that gag order.

With respect to the access of cameras and the press in the courtroom, the Court personally came out, helped select the place where the camera would be positioned so as not to interfere with anybody's trial rights.

One of the factors present in the Skilling case was that the reporters were so close to the defendant and his counsel that they couldn't even have a private conversation because the press could overhear every word.

I think the Court is on the right track already. Clearly what's happened in this case does not give rise to that presumption of prejudice, which is what the defense has argued up to this point. And it is their burden to meet that, and they have not met that burden.

And the state also after reading the Skilling case in particular, I do think that we should discuss the selection of the jury, questionnaires, and how to make sure that the defendant does receive his fair trial here.

Thank you, Judge.

THE COURT: Thank you, Ms. Polk.

Mr. Li, did you want to make a comment?

MR. LI: Your Honor, the only point I'd make is that the Skilling case provides that in determining the test about whether presumptive prejudice has been created, one of the issues is whether the pretrial publicity occurred close in time to the trial. It's for that reason we think the more appropriate time to bring up this motion is closer to trial.

All of that having been said, we agree there are methods that the Court can do and the Court has done to ensure that this is a -- to create a procedure that will maximize ability of Mr. Ray to get a fair trial -- for instance, some of the suggestions that the Court has relating to the jurors, selection of the jurors, et cetera. And I think it might be an appropriate time at some point later to discuss what those measures might be.

THE COURT: Thank you.

I read the Sheppard case back when we were considering pretrial publicity and potential gag order. I haven't read Skilling. I'd like to do that.

So I'm going to take the matter under advisement. I will say this: If there is a denial, I think it is of necessity without prejudice. Because the test really is what difficulty is encountered when jury selection begins. I think you have to keep an open mind and see what happens at that point even -- you know -- when there is a denial of a request to change place of trial.

So that is under advisement.

Anything else on that?

The other matter I did want to take up has to do with the meeting with medical examiner and the request for sanctions. I want to take up primarily the substantive part of that at this point.

That was your motion, Mr. Li.

MR. LI: Thank you, Your Honor. If I could, there has been a lot of paper that's been filed in this particular motion. So if I could summarize a few of the most pertinent facts and then move to the argument.

Your Honor, the basic facts -- and this is well documented in the various pleadings that we filed. No. 1, the clinical requirements for a

diagnosis of heat stroke are very rigorous and require, among other things, evidence of dehydration. In this particular case there was no evidence of dehydration. And, in particular, Dr. Mosley, one of the medical examiners, said, I don't think she had clear evidence of being dehydrated, from the lab reports at the hospital.

Dr. Lyon, the other medical examiner, said that the dehydration test known as electrolyte screen were, essentially, normal.

Nor were there any other clinical evidence relating to heat stroke, such as raised body temperature, tenting, et cetera. And lacking this clinical evidence, the medical examiners relied on reported circumstantial evidence that they obtained from the police, among others. And in Dr. Mosley's case, he said 99.8752 percent. And Dr. Lyon's case, he said that the circumstantial evidence was 90 to 95 percent.

They got this information at a meeting on December 14, 2009. And that meeting -- the purpose behind the meeting was to provide the medical examiners information from which they could propose a diagnosis. This is confirmed by Detective Diskin, Detective Poling, Dr. Lyon,

Dr. Fischione and Dr. Mosley. All of them are in accord on that particular point. And I'll get to that a little more in a bit.

Prior to the meeting, a PowerPoint was emailed to Drs. Mosley, Lyon and Fischione. The PowerPoint was created entirely by Detective Diskin. They consisted of witness statements only. No one from the county attorney's office was involved in its preparation. It did not contain any legal theory, opinion or conclusion.

These are all confirmed by what Detective Diskin said at pages -- this is Exhibit 59 of page 30. It was prepared and presented to the medical examiners to help them come to whatever conclusion they would come to. And that's at page 26. The state never discussed any of its opinions, theories or conclusions at the December 14 meeting. And that's Detective Diskin at page 38, Detective Poling at page 20.

The medical examiners, the state's experts in this case, designated by the state to testify as experts as to cause and manner of death, relied on and considered the meeting and the PowerPoint as a basis for their opinion. That's Dr. Lyon's transcript at page 14 and page 15,

page 17, Dr. Mosley at page 29.

So this meeting took place in December 2009. The autopsy reports were released almost two months later, on February 2, 2010. We were not informed, the defense was not informed, about this meeting or about the existence of the material provided to the experts as a basis for them to form their particular opinions.

We found out about this in the course of examining Dr. Mosley as part of our pretrial interview process. We talked to him. Mr. Hughes was present. And we found out about the meeting, and we asked questions about the meeting, including who was there, what was the meeting generally about, why was it called. We found out about the PowerPoint. During that whole colloquy with the doctor, Mr. Hughes was sitting right there, and he never raised an objection.

After the meeting we requested a very limited set of documents relating to this particular December 14 meeting, including the PowerPoint, the ability to question the witnesses about what information these experts were given so that they could prepare their expert opinion. We were told by the state that the entire meeting was

work product.

We wrote back and asked well, surely you don't mean the entirely meeting? Surely there is some portion of it that we can ask about? And we got no response.

Later on we attempted to interview the doctors and the police officers and detectives relating to the meeting. And at that point the county asserted work-product objections, although fairly inconsistently in that regard.

So those are the basic facts. I don't think they can be reasonably disputed. They are contained in transcripts that we filed with the Court, and we have them tape-recorded.

It is beyond dispute that mere materials provided to an expert who is going to testify, those materials are subject to discovery. And the cases I cited are Emergency Care Dynamics versus Superior Court, 188 Ariz. 32, 1997; State v. Roque, 213 Ariz. 193, 2006. Also Green v. Nygaard, N-y-g-a-a-r-d, 213 Ariz. 460. And that's at 2006.

And, essentially, those cases hold even if material is work product or privileged in other ways but it is then provided to an expert who is going to testify, that work-product protection has

been waived because now that the issue of how the expert came to his opinion is put before the Court and must be subject to cross-examination.

Doctors Mosley, Lyon and Fischione have been named by the state as testifying experts. This is in the state's first supplemental disclosure, filed March 4, 2010. It's beyond dispute that materials were provided to them at the December 14, 2009, meeting.

Now, there is some dispute as to what the purpose behind the meeting was. The state contends that this was a charging -- this was a meeting to have a charging decision two months before even the autopsies were created. But the state claims that this was a charging meeting.

I would ask the Court to look at what the medical examiners and detectives themselves say the meeting was for. The medical examiners say that the meeting was to get information for them to form their conclusions; in Dr. Mosley's words, to try to coordinate our reports, to have a dialogue about our thinking about why these people died.

In Dr. Lyon's words, it was to discuss those issues and get input as to what other opinions were as to the cause of death.

Dr. Fischione, who is the chief medical examiner of Maricopa County, told us that his role was to act as a mediator between the various opinions among the medical examiners.

Question -- and this is in our discussion with him:

Question: Why did you want to get all the parties on the phone? What were you trying to accomplish?

Answer: Before we can finish our cases and come up with what is actually going on in these cases, it is imperative that we understand what the investigation was. I thought it was imperative that we get an idea of what was going on with this case because, essentially, aside from Dr. Lyon doing the autopsy and Dr. Mosley doing one in Coconino, we did not have any investigation.

And so I thought it was imperative that everybody involved -- everybody be involved with what the investigation is because that's a big part of us finishing any case, not just this case but any case.

Question: So it was important for forming your opinions as a medical examiner? It was important for you to gather the facts from the

people who have them and to make sure all the other medical examiners involved in the case would also have access to those facts; is that correct?

Answer: That is correct.

Question: So they could form their conclusions?

Answer: That is correct.

Question: And did you get those facts?

Hughes -- at this point Bill Hughes: And I would raise an objection to that.

It's also beyond dispute that the testifying experts reviewed this material in forming their opinions as to the cause of death. Dr. Mosley said at page 22 of his transcript that 99.875 percent of his conclusion was based on such things as the PowerPoint and the meeting. I'd also cite the Court to page 29 of his transcript.

Dr. Lyon said that it was 90 to 95 percent of his conclusion -- and I'd cite page 17 of his transcript -- and that he relied on things such as the PowerPoint and the meeting. And I would cite page 17 again.

The state doesn't actually answer the question in any of its pleadings. It cites no case anywhere for the proposition that a testifying

expert -- that the state can shield from discovery materials provided to a testifying expert that the testifying expert considered in forming his or her opinion. There is not a single case in any of the state's pleadings and, I would submit, not anywhere in this land that provides that information provided to a testifying expert can be shielded from discovery.

The state, however, perhaps in an effort to circumvent that argument, attempts to argue that the medical examiners are actually part of the state's prosecutorial team. That's wrong on both the law and the facts. In terms of the law, the Court itself in its May 5, 2010, ruling found that medical examiners, quote, may not be included in the category of persons and entities listed in Rule 15.1 as being under the prosecutor's direction or control. They are not employees. They are not police officers. They are an independent agency able to control their own disclosure of information.

And the medical examiners themselves know this. And as we were going through the colloquy and discussing with Mr. Hughes as to what the form of the objection was, why they were objecting to

work product, Dr. Fischione, the chief head medical examiner of Maricopa County, felt compelled to state -- he literally stopped the questioning and said, I really feel compelled to say this. He said, this is probably in 18 years on any criminal case that I've been involved in the first time that a prosecutor has ever told me not to answer a question. So that's why I'm a little per perplexed.

I'm a totally separate and -- let me just say this: I'm totally separate. Whether it's Maricopa, Yavapai, Coconino, Yuma, whatever, I'm totally separate from police agencies as well as prosecutorial agencies. Like I said, it's up to -- when I have a pretrial meeting, it's up to the defense to bring out everything that I'm involved in as far as doing this case. And usually the prosecutor is there. But I've never had a prosecutor tell me not to answer.

And I insert that quote, not to answer.

And again, Bill, this is just new to me. Bill being Bill Hughes. And I want it on the record that you know I'm a separate entity even though I'm a contractor with Yavapai County. I'm still a separate body from anything to do with the

police or with the prosecutor's office.

So the state spends a fair amount of time in its papers arguing that notwithstanding the fact there is no law that supports this position, notwithstanding the fact that the doctors themselves have testified and, essentially, instructed the county attorney that they are a separate entity -- they spend a fair amount of time arguing that just because there is some duty to report on the part of these medical examiners to the state that somehow they are now part of the prosecutorial team. They are not, either under the facts or the law.

So, essentially, Your Honor, information has been provided to a separate expert who is going to testify. That information should be provided to the defense.

This subsequent part that I'm going to discuss for a second, this is about whether or not this is work product -- this is even work product at all. The Court does not need to reach this particular issue in order to decide this because the first issue is dispositive. But it's important to note that this is not work product.

Just for starters, this was not a

charging meeting, at least the part involving the medical examiners, which is the only part that we're requesting discovery about. There is not a single witness that agrees with the state's claim that the meeting with the medical examiners was part of a charging decision. No attorney spoke at the meeting.

This is Detective Diskin -- he's a lead case agent -- at page 38 and 39. Question: During this entire discussion between the various medical examiners, did anyone from the Yavapai County Attorney's Office say anything?

Answer: No.

Question: So it was solely between the examiners?

Answer: Yes.

No legal theory was presented or discussed. And this is Detective Poling -- he's the co-case agent -- at page 20 and 21. Question: Did the county attorney's office provide legal advice or present legal theories or anything like that during the meeting?

Answer: I don't remember any legal issues.

Question: You don't recall any legal

issues coming up?

Answer: No.

Detective Diskin stated that his PowerPoint presentation was purely factual, that it contained mostly or almost all witness statements. And that's Diskin's testimony at page 30.

The critical thing is, Your Honor, that at least with respect to the medical examiners, which is the only part that we are interested in -- we are not interested in what charging decisions the state made. We understand that those are immune from discovery. We are, however, interested in what information was provided to the expert witnesses.

In short, Your Honor, the state's position is entirely without factual support; and the pleadings, at least on this particular point as to whether or not discussions with the medical examiners were part of a charging decision, are incorrect or at least do not tell the whole story.

And we request, Your Honor, that the Court order the state to provide to us the PowerPoint presentation that was given to the medical examiners and presented to them during this meeting and any other materials that were provided

to the medical examiners and allow further inquiry with the various witnesses who were at the meeting as to what the substance of those discussions were so that we can explore the basis upon which they form their expert opinions.

THE COURT: Thank you, Mr. Li.

Ms. Polk.

MS. POLK: Thank you, Judge.

Judge, my first observation would be that the nature of the request from the defendant seems to be changing over time. Back in May when Ms. Do first sent a letter to the state requesting information about our charging-decision meeting, at that time what she asked for were any notes or any material provided to the state from the medical examiners.

Later the request turned into a request for the PowerPoint presentation that was presented at the meeting and the attorney notes. And now today they're requesting to be just for the PowerPoint presentation or, in Mr. Li's words, they're only interested in material that was provided to the medical examiners.

Yet in the motion they specifically are asking for notes from the participants at the

meeting including the notes of the prosecutors.

So I guess today what we are discussing is simply the PowerPoint presentation, although -- well, I guess we're just discussing the PowerPoint presentation.

The first point that I want to make absolutely clear to the Court is that the defendant has everything that the state is obligated to provide under Rule 15.1. They have everything that the medical examiners relied upon in coming to their conclusions as to cause and manner of death.

We have provided over 4,600 pages of disclosure in this case. We have provided all of the department reports, all of the police reports, all of the witness statements. We have provided complete medical files for each of the victims as well as medical files for all the other participants at the sweat lodge event who were injured or suffered some sort of physical distress.

We have provided the complete medical examiner files. The state personally made the effort to check with the medical examiners to make sure that every single note, every single diagram, every piece ever paper provided to them, including any information that the medical examiner

investigators has gathered, has been turned over to the defendant.

So the state has provided all the facts upon which the medical examiners have relied upon in reaching their decision.

What we have not provided is a PowerPoint presentation, which is clearly work product. There is no information in that PowerPoint presentation that the underlying facts for which have not been provided to the defendant. What was not provided is simply the PowerPoint, which is an analysis of the facts. And it contains the mental impressions, the analysis and the conclusions of the prosecution team. And clearly, Your Honor, that PowerPoint is work product.

I want to discuss a little bit the December 14 meeting. On December 14 of 2009 the state held a meeting at the county attorney's office where the detectives in the case presented the facts of the case to the state to make a charging decision.

Important to the prosecutors in making that charging decision was what the medical examiners have to say about the cause of death of the three victims. And so they were invited to our

meeting.

At that meeting the detectives presented a PowerPoint presentation that, again, summarizes the evidence in the case and analyzes the evidence in the case and includes the conclusions of the detectives in summarizing the case and presenting it to the county attorney for a charging decision.

There were many participants at that meeting. I personally was present at that meeting. And I don't know if other participants took notes, but I personally took notes because that's the way I work.

At the conclusion of the meeting, I sent out a letter to the participants in the meeting. And I attached it to the state's response as Exhibit A. And that letter was sent out two days after the meeting.

So the defense is trying to argue that we are fabricating or trying to change the character of that meeting in response to their motion to compel. And that simply is not true.

Two days after that meeting the state sent out a letter to the participants and particularly to the medical examiners thanking them for their time. And at the meeting, and I quote,

the PowerPoint presentation is privileged material prepared as work product by the Yavapai County Sheriff's Office to assist in analyzing the facts of the case.

Furthermore, it is a work in progress in draft form only. It is not a public record and not for public dissemination beyond those in attendance in our meeting. Please ensure that the confidentiality of the document is respected and maintained.

So two things are important. First, that PowerPoint was simply a draft prepared by the detectives. But secondly, and most important, two days after that meeting this is documentation that that PowerPoint was considered at the time to be work product and it should be respected today as work product.

So any suggestion that the state is somehow fabricating what that meeting was about is belied by the letter that the state sent out two days after the meeting.

The purpose of having the medical examiners present at the meeting was so that the prosecutors in making a charging decision could hear directly from the medical examiners about the

cause and manner of death.

The medical examiners did not produce any records for us at that time. And the first request from the defendant to the state was for information provided by the medical examiners. So they didn't provide anything to us at that time. It was a charging decision. We simply wanted to hear from them about the death of the three victims.

And now I want to clear up the notion that there was some kind of controversy among the medical examiners. Because, frankly, Your Honor, there is no controversy about the cause of death. And the defendant has built this motion to compel around this fabrication. They have created this controversy in order to somehow convince the Court that they are entitled to the state's work product.

Dr. Lyon is the medical examiner who autopsied both Ms. Brown and Ms. Shore. In the interview the defense attorneys were specifically told -- and they were shown the autopsy reports by this doctor showing that he transcribed his autopsy reports two months before the December meeting. Those autopsy reports show that he transcribed or that his autopsy report was transcribed on October 24 of 2009. That's about a month and a

half before the meeting.

With respect to this so-called controversy, Dr. Lyon was asked by the defense attorney about the controversy. And he clearly stated that there is no controversy. And I would refer the Court to Exhibit 63 to the defendant's declaration, page 23. It's a question by Mr. Li.

Okay. So it seems like, then, perhaps you're aware that there might have been differences of opinion about -- you know -- about whether hypothermia versus heat stroke and what have you prior to that meeting?

Dr. Lyon: Yeah.

Mr. Li: How were you made aware of that?

And Dr. Lyon says, well, that's just something I would think of because, based on my work experience, some people go with hypothermia and some people go with heat stroke.

Then in the interview of Dr. Mosley -- and I refer to Exhibit 54 to the defendant's declaration. Dr. Mosley autopsied Ms. Neuman. And on page 11 -- actually, let me read from page 21 at the top of the page.

It's a question by Ms. Do. Okay. So then if you can explain to me what is the -- what

is your disagreement with the phrase "heat stroke" as compared to "hypothermia."

Dr. Mosley: It's wording.

Ms. Do: Just wording?

Dr. Mosley: Yeah.

And then finally Dr. Fischione. And that's Exhibit 62. And I'll read from page 44. Dr. Fischione, who is the medical examiner who is on contract with Yavapai County to perform our medical examiner work -- Dr. Fischione did not perform any autopsies. However, the state has listed him as a potential witness in the trial, and so the defense interviewed him.

But on page 44 of his interview Mr. Li said, were there differences of opinion at any time between the medical examiners about the cause of death?

And Fischione says, well, there would only be two. And, again, Dr. Lyon. And I can only state -- speak to Dr. Lyon because he's here and he's part of the contract group. There was no.

And Mr. Li: Between you and Dr. Lyon?

Fischione: Yes.

It's a response to the question. And then he says, no. Not at all.

Mr. Li: Well, how about between Dr. Lyon and Dr. Mosley?

And Dr. Fischione says, not that I'm aware of. And, again, that's something you would have to ask Dr. Lyon about.

And I've already quoted Dr. Lyon's interview.

Mr. Li: But none that you were aware of?

Dr. Fischione: No. None that I was aware of.

Again we're talking about seasoned people here. So, you know, we're not talking about these are just junior MEs getting out of their fellowships. These are guys who have been doing this for a long, long time.

So I think, Your Honor, it's clear that there is no controversy among the medical examiners, as the defense would have you believe. Two of the autopsy reports report heat stroke. I don't have the autopsy reports in front of me, Judge. But clearly what all three medical examiners have told the defense attorneys is that there is no difference of opinion among them as to cause of death and that any use of different words is just wording, just semantics. So there is no

controversy.

And it's that controversy that the defense has created as somehow the vehicle that then allows them to get work product from the state.

Mr. Li also argued today that the doctors have relied upon -- have stated in the interview they relied upon the PowerPoint presented by the state.

And I want to read you some quotes from the interviews to clarify that misunderstanding as well. Mr. Li told the Court that Dr. Mosley said that -- I wrote down that 99 percent of his opinion was based upon that meeting. I think he has misread or perhaps misquoted or misstated in court.

But I'll read to you what Dr. Mosley said. There was a discussion about what factors Dr. Mosley relied upon. And he went through the series of factors that he relied upon and then the question -- and none of those -- he did not reference the state's PowerPoint at all.

And then there was a question by Ms. Do: How much weight did you give to that?

And he was relying to all these other factors, not to the PowerPoint.

And Mr. Mosley says, a great deal of weight. 99.8752 percent.

And that's specifically what he said about relying on factors not the PowerPoint.

And then in the interview of Dr. Lyon, page 15, Dr. Lyon says, prior to this meeting on the phone, did you receive a PowerPoint presentation?

And Dr. Lyon says, as I recall, that was part -- or shown during that meeting.

Mr. Li: Did you receive it?

Dr. Lyon says, yes.

Mr. Li: Was that something you examined, looked at?

And Dr. Lyon says, yes.

And Mr. Li says, is that something you used in forming some of your conclusions?

And Dr. Lyon says, no. Not necessarily.

Well, now Mr. Li and the defense know that they are trying to elicit certain statements from witnesses in order to have material for this motion to compel. So Mr. Li goes on to say, is that something that you looked as part of your process in forming your conclusion?

And, of course, Dr. Lyon says, yes.

But what's material is that Dr. Lyon says that PowerPoint was not something he used in forming his conclusion.

There has been a suggestion that the state has waived a work-product argument. And I would submit to the Court that that is absolutely untrue. The state -- the work product is, by the way -- Your Honor, it's a privilege for the state to assert. It's not a privilege for a witness such as these medical examiners to assert. It's a privilege that the state must assert.

And that's why we began asserting it. Because with each successive interview the defense team focused more and more in on our charging-decision meeting.

Early on in an attempt to resolve the issue, we allowed the defense to ask questions of the witness hoping that the defendant -- the defense team could then understand and see why we were claiming it was work product.

But that appears to have backfired. Because the more they were allowed to ask, the more they wanted to ask. And now in their pleading they make the motion that the state has somehow waived the work-product claim.

I want to direct the Court's attention now to what the correct analysis of this issue is. Do they get the state's PowerPoint and the attorneys' notes or not? The correct analysis is not whether the medical examiners relied on something in that PowerPoint in reaching their conclusion.

The correct analysis is this: And it's really a four-part analysis. Under Rule 15.1 has the state met its obligations of disclosure. Under Rule 15.4 -- that addresses work product and specifically states that work product is protected from disclosure.

Rule 15.1(g), then, is the hardship rule, which allows a party who can show a need to get disclosure that's otherwise not covered under Rule 15.1. And then, finally, the fourth part of this analysis is that even under the hardship rule, the courts will protect work product from disclosure.

So going back to the -- this analysis and the first part of this analysis, the first question is under Rule 15.1, has the state met its obligations of disclosure? And, again, Your Honor, the state has meticulously, carefully, thoroughly

provided everything to the defendant. Everything that has been generated by any witness in this case -- statements, copies of photographs, complete medical examiner files, over 4,600 pages -- have been disclosed to the defense. And we can continue to disclose as we discover new information or additional DRs are generated.

We have fully met our obligation under Brady, and we continue to meet that obligation under Brady.

Then we move to Rule 15.4. And 15.4 of the Rules of Criminal Procedure specifically reads as follows: And it's 15.4(b)(1), work product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers or of defense counsel or defense counsels' legal or investigative staff.

This doctrine of work product is clearly recognized as a viable doctrine in criminal cases. And in the United States versus Noble, which is 422 U.S. 225, the Supreme Court specifically noted the importance of protecting work product in criminal

cases.

What the Court said in this case is that although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, it's role in assuring the proper functioning of the criminal justice system is even more vital. The interest of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

The doctrine clearly applies to the notes taken by the attorneys at the December 14 meeting and, by the very language of 15.4, applies to the notes and legal theories of the team. And specifically it says that if the rule applies to members of the prosecutor's legal or investigative staff or law enforcement officers.

Again, I'd like to read from the United States versus Noble's decision.

And herein it states, one of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect

material prepared by agents for the attorney as well as those prepared by the attorney himself.

The issue of whether or not the work product extends to the medical examiners, Your Honor, I believe is not a relevant issue. I think there is an argument to be made in cases that we cited in our response that the medical examiners are part of the prosecution team. But I am not asserting that argument because I don't believe it's necessary to this court's determination.

There is no argument to be made that the presence of an individual such as a medical examiner or a member of the public, for that matter, at a meeting where work product is on display somehow violates or waives the work-product protection.

If a document is work-product protected, it remains work-product protected. The fact that medical examiners are present at that meeting and viewed the document does not interrupt in any way the work-product protection assigned to the document and particularly the PowerPoint presentation.

The analysis, then, Your Honor, of whether or not a document is work-product protected

is set out in the state's response. And I want to quote to the Court from Upjohn versus United States, which is at 449 U.S. 383.

And that's where the Court says that notes of conversation with a witness are so much a production of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure. Notes and memoranda sought by the government here, however, are work product based on oral statements. If they reveal communications, they are in this case protected by the attorney-client work privilege to the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications.

The five-factor test to use in determining whether a document is work-product protected is set out in Brown versus Superior Court, Maricopa County. And the cite is 137 Ariz. 327. And that's a 1983 case where the Arizona Supreme Court set out five factors that one uses to analyze whether a particular document is work-product protected.

The first factor states that the Court should consider the nature of the event that

prompted the preparation of the materials and whether the event is one that is likely to lead to litigation.

That meeting, Your Honor, was a charging-decision meeting that very clearly has led to litigation.

The second factor for the Court is to determine whether the requested materials contained legal analyses and opinions or purely factual content in order to make inferences about why the document was prepared.

Again, the PowerPoint presentation that's in question is based on all the evidence in the case but is the mental impression of the detective. It's his conclusions and it's his analysis and his summary of the facts in the case, clearly work product.

The third factor indicates that courts should ascertain whether the material was requested or prepared by the party or their representatives. When litigation is anticipated, it is expected that an attorney will have become involved.

And, as I've indicated to the Court, the prosecutors, including myself, we were present.

The fourth factor the Court should

consider, whether the materials were routinely prepared and, if so, the purposes that were served by that routine preparation. If it's a material that's routinely prepared, more likely than not it will not be work product. But if it was prepared for that occasion, as this PowerPoint was, then it will more likely be work product.

And then, finally, the Court should examine the timing of the preparation and ascertain whether specific claims were present or whether discussion or negotiation had occurred at the time the materials were prepared.

And, again, the timing is such that this was the meeting where the detectives were presenting the case to the prosecution for the prosecutors to make a charging decision. Clearly this was a meeting that was held in anticipation of litigation. And clearly that PowerPoint was prepared in anticipation of litigation.

I think, Your Honor, that I have established clearly that the PowerPoint presentation is work product. There is no question that notes taken by participants at the meeting -- by the prosecutors -- that those are work product.

It's not clear to me now whether the

defense is still asking for our notes, but in their motion they're asking for our notes. But the notes taken are clearly work product and that PowerPoint is work product.

So the third part of the analysis, then, is if a document is work product, can the defendant or the party requesting it under Rule 15.1(g) make an argument that they are otherwise entitled to it?

And 15.1(g) states -- this is the rules of criminal procedure -- that upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1. And so the first part of the test is the defendant has to show substantial need in the preparation of their case for this material.

The rule states that the defendant is unable without undue hardship to obtain this substantial equivalent by other means. That's the second element they have to meet. Then the Court in its discretion may order any person to make it available to the defendant.

Under Rule 15.1(g), the hardship rule, again, the defendants have not met their burden.

First of all, they have to show substantial need. And that's why, Your Honor, they have tried to create a controversy among medical examiners when it simply doesn't exist.

But secondly, and probably more important, they have to show that they are unable to obtain the substantial equivalent of this information by other means. And that's where it becomes so important to remember that the state has disclosed all the information.

The state has disclosed all of the underlying facts, all of the police reports, all of the medical examiners' information upon which that PowerPoint is -- was constructed or was made. So there is nothing new in that PowerPoint.

What's in that PowerPoint that the defense wants so much are the mental impressions and the legal theories of the state in this case.

Part 4 of the analysis, Your Honor, goes on to state that even if the Court were to find that somehow the defendant is entitled to work product under the hardship rule, that the courts must still protect the work product itself, that they still must protect the mental impressions, conclusions, opinions and legal theories of the

attorneys and their agents.

And that is found specifically in the case called in re Cendant -- I cited in our response -- 343 F.3d 658.

So, Your Honor, just to summarize what the argument is, I think the most important thing for the Court to remember is that the state has given everything to the defense. We have fully met our obligations under Rule 15.1. We have fully met our obligations under Brady. The defense has the entire file of the medical examiners, and they have all of the evidence, all of the reports, all of the witness statements, all of the medical records relating to other parties at the sweat lodge upon which the medical examiners base their conclusions.

This is a fishing expedition by the defense. What they want is not just the evidence in the case, they want access to the state's legal theories and to our mental impressions and to our analysis of those facts. That is work product, and that is specifically what they don't get.

I think the Court should ask yourself, if they get this, then what next? Both parties continue to identify experts. If the Court is to find that a party is entitled to interview an

expert about conversations they had with the prosecutors and if they're entitled, then, to see everything that the party has provided to their expert, then it doesn't end here.

The defense has noticed a medical examiner out of Albuquerque. So if the Court orders that this PowerPoint and the attorneys' notes have to be provided to the defense, then the logical extension of such an order would be that the state would be entitled to interview that expert about any conversations that expert had with the defense attorneys. The state would be entitled to see any notes that the defense attorneys have taken in the context of the interview with their medical examiners, and the state would be entitled to this wholesale discovery process into the thoughts, the mental impressions and the legal theories of the defense team. And it would continue with respect to the state. The state is in the process of identifying additional experts.

If the Court is to rule that the parties are entitled to discover conversations between the attorneys and the experts and discover our notes that we take, then there is no stopping here.

And ultimately, Your Honor, that creates

a tremendous chilling effect on all the attorneys. And specifically I can speak on behalf of myself because I am a copious note taker. The thought that suddenly I cannot take notes in preparation for a trial because the Court's going to order them to be disclosed is unthinkable. It's not supported by the law. Those are clearly work product, as is our PowerPoint.

And I would ask the Court to so find. Thank you.

THE COURT: Thank you, Ms. Polk.

Mr. Li, did you have a reply?

MR. LI: Yes, Your Honor, I do. I would start off by noting that I think Ms. Polk misunderstands what the record actually is. After the meeting that we had with Dr. Mosley, we wrote the county attorney's office a letter requesting specific items. That's Exhibit 55, I believe. 55.

And it sets forth the items that we request at page 3. They are all the names of all the persons in attendance, a copy of the PowerPoint, any audio recording of the meeting, any notes taken by attendants in connection with the conference and existence of any Brady material at this conference.

In our motion, which I guess I have to state every single thing we are requesting orally otherwise it's not taken seriously by the state -- but in our motion we state we want the names of all the persons who attended the December 14 meeting, a copy of the PowerPoint, notes including prosecutor's notes only to the extent they contain statements of medical examiners at the meeting, reinterviews of Dr. Fischione, Lyon. Diskin and Boelts without obstruction and any Brady material.

So we have not actually changed substantially at all as to what we're requesting. We have attempted to communicate with the state, but they simply don't reply.

I think Ms. Polk also misstated the record with respect to what I said about what Dr. Mosley's collusions were. He said that 99.8752 percent -- and this is at page 22 -- was based on circumstantial evidence. That is nonclinical findings. Okay?

So if you break that down, there is the clinical findings, which are the autopsy and the tests and what have you. And he gives a discussion about how those are not particularly conclusive in his discussion, in his interview. And then he

breaks -- he says, well, 99.8752 percent of his finding is based on the circumstantial evidence.

At the time we were asking these questions, the state had not told us that they had had this meeting on December 14 in which they provided a PowerPoint to the various experts in which they summarize what the facts were for these various experts. So we didn't know even to ask that question.

So the fact that he doesn't mention the PowerPoint is not particularly relevant because, as Ms. Polk knows, the state never told us about it, and we didn't know to ask about it. It was only after at the very close of the interview where Dr. Mosley just mentioned, oh, by the way, they gave us a PowerPoint too.

Diskin -- I'm sorry. It wasn't even the doctor. The detective raised his hand and told us that, in fact, there had been a PowerPoint he created. And it was at that point after the interview that we requested the PowerPoint.

It's beyond dispute that the doctors relied on the PowerPoint. Whatever Ms. Polk would like to you believe, Your Honor, Dr. Lyon specifically says that he relied on the PowerPoint.

And that's at page 17 of Dr. Lyon's testimony, in which he says, okay -- this is a question. Can you for Kirby Brown tell me everything you relied upon. Can you tell me all the facts upon which you based your conclusion that Kirby Brown died of heat stroke.

And he lists a number of materials. And he says, the meeting, the PowerPoint.

So whatever Ms. Polk would like the Court to believe about whether or not Dr. Lyon relied on the PowerPoint in forming his opinion, which he's then going to come into court and testify, he says that he relied on the meeting and the PowerPoint. We are therefore entitled to see the PowerPoint and learn about the meeting.

And the reason is fairly clear, Your Honor. The state says that, oh. Well, we provided the defense with every single thing that is encompassed in this PowerPoint. We'd like to see the PowerPoint to make sure. What if the PowerPoint contains an error? What if in the summary that the state is presenting to the expert who is going to rely upon that for his understanding of what the facts and circumstances under which these tragedies took place -- what if

there are errors? What if they misstate what the actual evidence is?

Either -- and I don't have to suggest that it's intentional. It's just that if there is incorrect information going into the expert's opinion, that could have an impact on that expert's conclusion. That is impeachment material. Or omissions, frankly, Your Honor. If things are left out.

So while the state -- Ms. Polk, is casting aspersions on us and suggesting that we are manufacturing a dispute between the various medical experts, look, I'll tell you the medical experts didn't agree on the terms to use in relation to the cause of death for the folks who passed away.

One said it was heat stroke. The other said he didn't like the use of the words "heat stroke" because there were certain very rigorous, clinical diagnoses that were required to find heat stroke, and they were simply not there. And so he refused to use the word "heat stroke." That's at page 14.

Whether the state wants to call that a dispute or not a dispute, it doesn't matter for purposes of this particular motion. What matters

for purposes of this particular motion is that the state provided information to testifying experts that they designated as their experts, and we're entitled see it.

There is no single case that the state has cited that provides a shield to that. The state says that work product remains work product for all eternity. That's false. If I wrote an attorney-client privileged memoranda to my client and I put all of my mental conclusions in it and I wrote it to my client and handed it to him and said keep that privileged, okay?

And then I took that same memo and handed it to a testifying expert and said, hey, base your opinion in part upon this, or that expert looked at it and said, yeah. Some of my opinion is going to be based on this, as Dr. Lyon testifies, there is no privilege anymore.

And the mere fact that the state is now attempting to corral all this into work-product protection is irrelevant. Because the moment you hand it to somebody else who is not part of your team, you lose that protection.

Moreover, there are no legal conclusions contained in here. They are just facts. That's

what Detective Diskin says. Detective Diskin says he didn't rely upon on the prosecution at all. There are no legal theories contained in there. It's just statements. It's his summary of what he believes the investigation shows.

And Dr. Fischione -- and this is a chief medical examiner of Maricopa County -- said the whole reason why he had this meeting and why he brought all these folks together is so that they could get this information. That's exactly what he testifies to. So they could get this information from the state and -- you know -- so they could --

Question: So they could form their conclusions?

Answer: That is correct.

Question: And did you get those facts?

And this is where the state asserts its objection.

So here is a set of experts seeking to get information from people who have information and who are going to provide it to them so that they can form their conclusions. And the moment we ask questions about what was that information, could we find out more about it, what kind of information was it, that's when the objection gets

asserted. That's plainly improper. There isn't a single case anywhere that provides for that.

I'd like to just close by summarizing -- by suggesting to the Court that Dr. Fischione actually got it better than the state, Dr. Fischione actually understands the law of privilege and work product better than the state does and how this procedure is actually supposed to work.

And he said, like I said, when I have a pretrial meeting -- and that's what this was, an interview -- it's up to the defense to bring out everything that I'm involved in as far as doing this case. And usually the prosecutor is there. But I've never had a prosecutor tell me not to answer. And, again, Bill, this is just new to me.

And there was another point where he said, this is probably in 18 years on any criminal case that I've been involved in the first time that a prosecutor has ever told he me not to answer any questions. So that's why I'm a little perplexed.

So when Ms. Polk recites these factors as if this is a very reasonable procedure and her position is -- makes absolute sense and we are fabricating disputes and we're making things up and

we're not citing case law correctly, I'd ask the Court to look at what Dr. Fischione, the chief medical examiner of Maricopa County, says, that he's never ever been instructed not to answer.

I wanted to cite one case, just a point of law on which the state is just flat out incorrect. And this is the whole point that somehow work product remains inviolable forever. If she were to hand me a work-product document, I would submit to you she would then lose that privilege over that particular work product. Just that one fact demonstrates that work product is not inviolate forever.

But in particular, when work product or material is handed to an expert witness who will testify, that work -- that privilege or that protection is waived. And I'd cite Green v. Nygaard, as I cited before, 213 Ariz. 460, 2006.

Quote -- and this is at page 463 -- a party waives the work-product protection ordinarily afforded the work of a consulting expert when that party designates that expert to testify at trial, which is precisely what the state has done.

The state has cited the Court a bunch of cases about how the work-product protection

applies. These all relate to consulting experts you call just to understand your case a little better. But these are not experts who are then going to get up on the stand and under oath offer an opinion about a matter that's material to the case.

If you put a person on the stand who is material to the case, the other side is entitled to know what that person relied on in forming his or her opinions. And that's all we're asking for.

THE COURT: Okay.

MS. POLK: Your Honor, may I respond to that last just to clear up the case law?

THE COURT: You may.

MS. POLK: Thank you, Judge.

The defense cited Green versus Nygaard. Your Honor, clearly there is a line of cases that the state agrees with that say that if the state in the process of interviewing witnesses, including experts, creates a statement to memorialize what that expert is going to testify about and that information has not otherwise been disclosed to the opposing party, it has to be disclosed.

And so the state's practice, for example, when we're interviewing witnesses, we have present

an investigator who will cut a new DR. He will cut a new police report if that witness is now telling the prosecutor additional information that has not been previously disclosed to the defense. That's our practice.

And the reason for our practice is there is no question that the opposing side is entitled to know what a witness is going to testify about. Arizona is a full-disclosure state. It's not a trial by surprise. That clearly is a basic tenet, and it's a tenet that we abide by.

In the case of a testifying expert, really what that line of cases are talking about are testifying experts versus nontestifying experts. Because there is a principal out there that if a defense attorney, for example, consults with a nontestifying expert and does not then have that person testify, they don't have to disclose the existence of that testifying expert or any reports that that expert generated.

Contrast that with a testifying party. If an expert becomes a testifying expert, then the basis for that expert's opinion has to be disclosed. And if the only document memorializing the statements of that expert happen to be notes

that a prosecutor took, then clearly they do have to be disclosed. I have no contention with that tenant, and we abide by it at all times.

That's not the case here. Here, under Rule 7.5, the rule on experts, the other side is entitled to the underlying facts for an expert's opinion. So, again, I'd emphasize for the Court, the defense has all of the facts upon which the experts, the medical examiners, have based their opinion. It's the work product that's our summary that -- and our analysis of those facts that the defense doesn't have.

And then I would go back to Rule 15.1(b)(4). And that's our obligation with respect to experts. The state has to disclose the names and addresses of experts who have personally examined a defendant or any evidence together with the results of the physical examinations, of scientific tests, experts or comparisons that have been completed. And the state has complied with that.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Li, on that point.

MR. LI: Your Honor, one last -- two points

I'd like to make. One is this issue about providing material that a testifying expert has used or considered in forming his or her opinion is not only the case law, but it's also just your basic Arizona practice guide one -- practice guide, Section 501.6. These are fairly standard rules. Perhaps that's why the doctor has never been asked not to answer questions about what he relied on.

With respect to the prosecutor's notes of what a witness says, they are not protected work product. And it is error not to produce them. And I cite State v. Reed, 1976, 114 Ariz. 16 at 30; citing State v. Nunez, which is a 1975 case, 23 Ariz., App. 462, App. 463, holding prosecutor's notes containing witness statements do not meet the work-product exception to disclosure under Rule 15.4 as they are not theories, opinions and/or conclusions of the parties and their agents. And it was error for the prosecution not to have disclosed the statements taken.

THE COURT: Thank you.

I need to look closely at the authority cited and will take this motion under advisement.

Mr. Li, you indicated that you intended to reply to the motion in limine -- in that motion

in limine that I mentioned?

MR. LI: Yes, Your Honor. And we are filing it today and have actually handed courtesy copies or service copies to the state just now. And today was the deadline for the filing of the replies.

THE COURT: Yes. I'd hoped -- I think I said it in the morning. These other motions -- we can address them. I indicated before because of the new assignment I have and I'm working on there, I can't do a whole lot.

But I want to make decisions that facilitate discovery and getting the case prepared here. I want to really prioritize that and make sure that we have hearings on those motions.

Ms. Polk, is there anything else that the state believes we can address today?

MS. POLK: No, Your Honor.

THE COURT: Okay.

Mr. Li?

MR. LI: No, Your Honor.

THE COURT: Then the dates that I've been given as possibly something that would work for both sides -- and I really do want to encourage you just to communicate and come up with dates for hearings. I have assistance with the calendar, so

it if it becomes necessary to vacate a trial and I have a different judge assigned in another trial, I'll do that to get the time needed to address the motions in this case.

But for now I want to reserve three days, subject to both sides having witness availability. I need to know that as soon as possible. But November 10 -- I'm sorry. November 9, 10 and 16, just reserve all day, basically, 9:00 to 5:00, regular court hours, for those three days.

And those will be devoted to whatever is necessary -- 404(b) motion, other discovery motions, anything else, hearing and argument.

Time is excluded at this point. We have not set a new trial date. So time is excluded. And I'll confirm the existing conditions of release as well.

Anything further?

MS. POLK: No, Your Honor. Thank you.

MR. LI: Your Honor, there was one matter. And it's not particularly my matter to bring up. But I've been contacted several times by folks in the media who have requested our motion to compel, which apparently is not currently available on the public website. The state's opposition and our

reply are available. But for some reason the motion itself is not available. And I think they want it.

Also there is a declaration, which, I think, we've by stipulation agreed that certain pages should be stricken from that stipulation. But aside from that the declaration is fine. And it seems that those things should be to the extent the press wants them available to them.

THE COURT: I had a full discussion here on the record.

Ms. Polk.

MS. POLK: Your Honor, I don't agree with the last thing that Mr. Li said. There are several declarations now that have been filed. We looked through some of them, found information in them that clearly is not public information. In fact, these are declarations filed by the defense containing the defendant's Social Security number and some other things.

So I have corresponded with Ms. Li -- Ms. Do. Sorry -- to let her know that these are voluminous. I think it's inappropriate that they are attached to pleadings in the first place. I think to the extent that the defense wants the

Court to consider them, they should ask for an evidentiary hearing where we can examine what's being entered.

And then if it's accepted or even if it's marked as an exhibit, it doesn't become part of a public record. It becomes part of the Court's exhibit file and handled by the clerk separately.

But those declarations are voluminous, and the state has not had time to go through all of them. Our preliminary review, though, indicates that there is information -- there is victim information, for example, in some of it. And it clearly should not be made public.

THE COURT: I will order at this time that the motion to compel will be made public. Just be in the file now and scanned. We'll take care of that.

But what about the voluminous documents that do contain material that may be in violation of HIPAA or victims rights or something like that? I don't know that there is. But just there is something out there that provides a legal reason to not have them made public. So I don't know that there are necessarily those kinds of records. But Ms. Polk indicates that perhaps there is. And there is personal identifying information that does

not have to be disclosed either.

How do we handle that?

MS. DO: May I address that, Your Honor?

THE COURT: Yes. Ms. Do.

MS. DO: I'm familiar with all of the exhibits that are attached to my declaration. And there are only three documents that address the concerns that the Court has raised. And those are the autopsy reports.

And as we stated on the June 8 status conference that we had by telephone, we had inadvertently included pages the Court had ordered not be made public. I have already offered to withdraw those exhibits. The Court had asked that we work it out with the state. I attempted to do so, but the state would not agree to a stipulation to remove those three documents.

So perhaps it's not necessary at this point. The defense is willing to withdraw exhibits 66, 67 and 68, which contain the information that concerns the Court.

The rest of the exhibits that are attached to the declaration are public record either by through -- by way of disclosures made by the state previously or they're information that

can be found on the internet, which we submitted to the Court in support of the motion to change venue.

I might also point out to the Court that while Ms. Polk is objecting to these exhibits, the state did rely on them, did cite to them in their responses to our motion to compel.

So insofar as these exhibits are concerned, there is not the type of information that the Court is concerned about being released to the public.

THE COURT: I didn't think Ms. Polk was objecting to them all. It was a question of having to go through and find identification information. And that just hasn't been done at this point.

MR. LI: Your Honor, it seems that the only thing that really matters for purposes of the motions are those exhibits that are cited in the motion. So, for instance, transcripts of various witnesses and what have you. I don't think Ms. Polk has an objection to -- I should let her speak for herself. But it would be hard for me to conceive of an objection to the transcripts of what these various witnesses say.

THE COURT: We've been referring to that.

MR. LI: Yeah. We've been spending a fair

amount of time discussing that. It seems that those are the main points. There are a few paragraphs that I think are part of the state's disclosure that -- you know -- show a sweat lodge event, I think, in 2008 or something like that. And those are also attached.

But beyond that it seems that if it would be -- if it would simplify things, perhaps we would just file -- refile -- without the drawing list, but refile to the Court -- you know -- a thinner group of exhibits that contain, among other things, the transcripts.

We would not withdraw this. I think they should make whatever inquiry they want to make. This is part of the record.

MS. POLK: Your Honor, Exhibit 48 is document that has the defendant's date of birth and Social Security on it, for example. And that's the defendant's exhibit.

And just as a general rule, Judge, the transcripts of interviews of witnesses are not public record. Those are not considered public record under Arizona's public record law. And I understand that the defendant wanted those transcripts in front of the Court for the purposes

of this motion. And I don't disagree with that. But I do think that we are moving into territory that invites more pretrial publicity and more pretrial discussion of what witnesses say by putting out on a public domain documents that are not public record.

And so all of the defense witness interviews that they are entitled to do and that they then transcribed, they then attached to these declarations. That is not public record. That's exactly the kind of thing in the Shepard case, the United States versus Shepard case, where reporters were discussing witness testimony not by looking at transcripts, by actually interviewing witnesses before the trial. And witnesses were being interviewed, and suddenly all their stories were out there.

And to the extent that all the parties in the courtroom are concerned about the issue of pretrial publicity and getting the defendant a fair trial, I think the better practice is to not release into public domain documents that are not otherwise by definition public record.

MR. LI: Your Honor, if I may just address that point. That's a very ironic position for the

state to take considering that they themselves released transcripts of their witness interviews by the box full. And to claim that somehow those aren't public records when they released them as public records is quite ironic.

We think -- they're just the record that our motions are based on. And to the extent folks want to see them, they should have a right to see them. If they don't want to see them, they don't have to see them.

MS. POLK: Your Honor, I just want to respond. I understand the frustration by parties when documents get released on a case. But Arizona's public record law is black and white. It is clear that documents that are generated by the public employees, the police reports, are public record.

And in this case they generated -- they made their reports by having the interviews transcribed, and that became their report. The state had no choice. We believe in the public record law. I supported it. I'm the county attorney. I comply with the public record law. And I have in this case.

But we have not released any documents that are not clearly public record. And when I had

doubt, I sought the advice of the Court. And I've done that on several occasions and given the defense the opportunity.

But we cannot quibble with the public record law. It is what it is. And I will uphold it, and I will comply with it. So everything that we've released we've had to release.

THE COURT: I'm going to need to look through all of the exhibits and see what all is in there. Seemed to me when I was looking at this before, I dealt with the principal that if I'm making a decision on a point, what goes into that decision probably becomes a public record, something that the public has an interest in just as a general guiding principal.

But I have not looked at these in any great detail. I've now heard some reference to them. I will look at these records --

Mr. Li, I understand what Ms. Polk is saying. You say there is irony in that because of what has been released. But normally witness interviews are not something that find their way into a court file. They might in a criminal context or motion to suppress, for example, something like that. They end up there. But not

routinely and -- not routinely. So --

MR. LI: Your Honor, I appreciate that. And we would submit that this is not a routine situation in that we believe the state is asserting an improper objection to discover that is plainly discoverable.

And the purpose behind submitting the witness interviews is to demonstrate that many of the positions taken by the state is simply incorrect. For instance, that these folks work for the county attorney's office or that they're part of the prosecution team. They're not. And they say that. And so that's why those are included in our motion.

THE COURT: Well, I will look through them, and I'll make a determination, give both sides notice before release. I'll indicate what I think ought to be.

Thank you.

MS. POLK: Thank you, Your Honor.

MR. LI: Thank you, Your Honor.

(The proceedings concluded.)

STATE OF ARIZONA)
) ss REPORTER'S CERTIFICATE
COUNTY OF YAVAPAI)

I, Mina G. Hunt, do hereby certify that I am a Certified Reporter within the State of Arizona and Certified Shorthand Reporter in California.

I further certify that these proceedings were taken in shorthand by me at the time and place herein set forth, and were thereafter reduced to typewritten form, and that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

In witness whereof, I have affixed my signature this 20th day of February, 2012.

MINA G HUNT, AZ CR No 50619
CA CSR No. 8335

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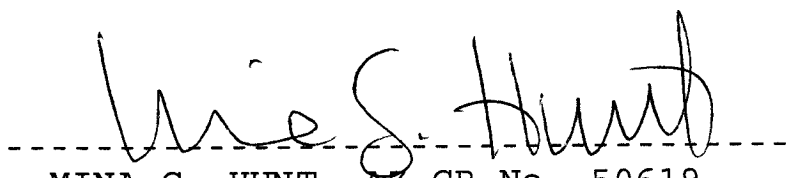

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